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IN THE

Supreme Court of the United States

..... Term, 1973

No. 73-164

IRVING A. KANAREK,
Petitioner,
vs.
SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES, et al.,
Respondents.

On a Petition for a Writ of Certiorari
Directed to the Supreme Court of the State of California

BRIEF OF RESPONDENTS IN OPPOSITION

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I

ISSUES PRESENTED

1. Whether petitioner has any substantive claim for compensation under California statutes.

2. Whether petitioner made a timely and proper claim for compensation under California's statutes and Constitution.

3. Whether the petition properly raises the issue of whether an indigent criminal defendant has a right to choose a particular publicly-compensated counsel to represent him.

4. Whether an indigent criminal defendant has a right to choose a particular counsel to be appointed by the Court and to be compensated out of public funds.

5. Whether a criminal defense attorney has a constitutional or common law right to be compensated out of public funds for representing an indigent criminal defendant where such representation was undertaken voluntarily and not by Court appointment or assignment and where such compensation was not demanded or requested until the completion of such services.

6. Whether the record of decisions without opinion by the state courts presents this Court with a federal question of substance.

II

STATEMENT OF CASE

The facts of the case reveal that the present petition, besides being substantively unmeritorious, is beset with procedural infirmities.

Petitioner became Mr. Manson's attorney by a written substitution of attorney and not by Court appointment.

> "Prior to the trial in said Action A253156, and by formal, written substitution, executed by the said Charles Manson, by the then attorney of record for the said Charles Manson in said Action No. A253156, Ronald Hughes, and by petitioner, which formal substitution as so executed was filed with

the respondent Court, petitioner became attorney of record for the said Charles Manson therein on May 27, 1970."

Petition for Writ of Mandamus and Writ of Certiorari, *Kanarek v. Superior Court,* 4th Civ. No. 12365, Page 1, Lines 21-27.

On June 1, 1970, the trial judge accepted the substitution of petitioner as attorney for Mr. Manson, but made clear that he was not making a court appointment.

"In making the above-mentioned order of substitution of petitioner for Mr. Hughes the Court stated: 'Very well, then, the Court will accept the substitution of attorneys. Mr. Kanarek is the attorney of record for Mr. Manson. Mr. Hughes is relieved as attorney of record. For the record, Mr. Kanarek, this is a private arrangement between you and Mr. Manson, and is not an appointment under 987 (a) of the Penal Code. Is there anything further, gentlemen?' "

Petition for Writ of Mandamus, etc., *supra,* Page 6, Lines 21-28.

Neither Mr. Manson nor petitioner at any time: (1) challenged the Court's characterization of the substitution as a private agreement; (2) requested appointment of petitioner pursuant to then Section 987a; or (3) sought to compel the trial judge to appoint petitioner under Section 987a as counsel for Mr. Manson.

Instead, almost two (2) years later, after completing his services as attorney for Mr. Manson, petitioner submitted a bill and requested that he be paid ninety thousand dollars ($90,000) in legal fees.

> "On or about April 17, 1972, pursuant to Penal Code Section 987.2, petitioner filed in said Action No. A253156 in Department 104 of the respondent Court, the Honorable Charles H. Older, Judge Presiding, a document entitled 'DECLARATION OF I. A. KANAREK ON BEHALF OF REQUEST FOR COMPENSATION AND COSTS IN CONNECTION WITH THE REPRESENTATION OF CHARLES MANSON.'
>
> * * *
>
> "Said Appendix A sets forth certain facts relating to petitioner becoming attorney of record for Charles Manson in said Action No. A253156, includes an itemization of the services performed pursuant to said representation, requests an evidentiary hearing as to the value of said services, and prays that petitioner herein be awarded the sum of $90,000.00 pursuant to his representation of Charles Manson in said Action No. A253156.
> "On July 6, 1972, in Department 104 of the respondent Court, the Honorable Charles H. Older, Judge Presiding, petitioner's request for compensation contained in said document (in effect a written motion to be paid pursuant to Penal Code Section 987.2) was denied. . . ."
>
> Petition for Writ of Mandamus, etc., *supra*, Page 2, Lines 5-24.

The "prayer" appended to the "declaration" petitioner filed with the trial court reads in full as follows:

> **"WHEREFORE, I. A. KANAREK, prays that he be paid $90,000.00 pursuant to his representation of Charles Manson in the above entitled case."**
> **Petition for Writ of Mandamus, etc., *supra*, Appendix A, Page 15, Lines 20-22.**

The Court of Appeal of the State of California, without opinion, denied the Petition for Writ of Mandamus. The California Supreme Court, without opinion, denied a petition for hearing on the action of the Court of Appeal.

III

PETITIONER HAS NO SUBSTANTIVE CLAIM FOR COMPENSATION UNDER CALIFORNIA STATUTES.

Petitioner's claim for reimbursement under the California statutory scheme, which provides for public compensation of attorneys assigned to represent indigent criminal defendants, is frivolous.

The statute provides solely for the compensation of Court-appointed attorneys.

> "In any case in which a person . . . desires but is unable to employ counsel *and* in which counsel is assigned in the superior court . . . to represent such a person in a criminal trial . . . such counsel . . . shall receive a reasonable sum for compen-

sation and for necessary expenses, the amount of which shall be determined by the court, to be paid out of the general fund of the county."

California Penal Code Section 987a (now Section 987.2(a)) in part. (Emphasis added.)

The statute creates two conditions precedent to any right of compensation by the attorney: (1) the desire but inability of the person to employ counsel; and (2) the assignment of such attorney to the case by the Court. Neither condition existed in this case.

First, Mr. Manson was able to employ counsel and did, in fact, employ Mr. Hughes and then substituted petitioner. Although Mr. Manson was indigent, the notoriety of the case may have been sufficient allure for these attorneys. And for all that appears from the petition and the record, the possibility of a private agreement between Mr. Manson and petitioner to pay for petitioner's services out of potential royalties for publications regarding the Manson Family, cannot be ruled out.

Second, the Court did not assign petitioner as counsel to anyone, but merely acceded to a private arrangement between Mr. Manson and petitioner whereby petitioner was substituted for Mr. Hughes as attorney for Mr. Manson.

Since the conditions of the statute are not met, petitioner has no right to compensation under the statute.

IV

PETITIONER DID NOT MAKE A TIMELY AND PROPER CLAIM FOR COMPENSATION UNDER CALIFORNIA'S STATUTES AND CONSTITUTION.

It is clear that, under Penal Code Section 987a (now 987.2), a Court is empowered to determine the reasonable sum for compensation of an attorney only where such attorney has been assigned by the Court. In this case, petitioner by "declaration' purported to request that compensation be determined by the trial court. At no time, however, up to and including the instant petition, has petitioner or his client sought to have petitioner "assigned" as counsel under the statute. Since compensation cannot be determined without prior assignment, the state courts properly refused petitioner's Petition for Writ of Mandate etc. which sought only to compel the trial judge to determine compensation.

Moreover, petitioner's claim in the state court was untimely, and laches was a sufficient ground for denial of the state petition. Petitioner undertook the representation of Mr. Manson on either May 27, 1970, when the substitution of attorney was filed with the trial court or on June 1, 1970, when the substitution was accepted by the trial court. But it was almost two (2) years later, on April 17, 1972, before petitioner requested public compensation for his services.

To the extent that there is any merit to petitioner's

present claim that petitioner and/or Mr. Manson had a right to have petitioner assigned as Mr. Manson's counsel, such claim should properly have been made in June of 1970 by writ of mandate.

Pre-trial mandate for such purposes has been expressly approved by the California Supreme Court.

> "Orders concerning the designation or substitution of appointed counsel are subject to such review [mandamus] (Citation)."
>
> *Drumgo v. Superior Court* (1973) 8 Cal. 3d 930, 933.

By neglecting to raise the issue of appointment at the time he undertook the representation and delaying almost two (2) years, until after his services had been completed, petitioner would seek to have the best of two worlds. He could pursue the private arrangement if (perhaps upon the acquital of Mr. Manson) such would seem profitable, or else he could seek compensation from the public. The equitable doctrine of laches should apply to bar relief by mandate.

But, in addition, petitioner is confronted with an absolute bar to payment by virtue of the California Constitution. Penal Code Section 987a (now 987.2) provides that compensation once determined shall be paid out of the general fund of the County. The California Constitution provides:

> "A local government body may not grant extra compensation or extra allowance to a public of-

> ficer, public employee, or contractor after service has been rendered *or* a contract has been entered into and performed in whole or in part, *or* pay a claim under an agreement made without authority of law."
>
> Article XI, Section 10 (Emphasis added).

Petitioner did not have a contract, and his service was rendered prior to any request for compensation having been made. Consequently, any compensation to petitioner would be "extra" and is barred under the cited provision of the California Constitution.

V

THIS PETITION DOES NOT RAISE THE ISSUE OF WHETHER AN INDIGENT CRIMINAL DEFENDANT HAS A RIGHT TO SELECT A PARTICULAR PUBLICLY-PAID COUNSEL.

Petitioner seeks to raise the broad issue of whether an indigent criminal defendant has a right to select and have appointed, and to have compensated from public funds, a particular attorney. But no such issue ever arose in this case.

It would appear from the record that Mr. Manson never requested the Court to appoint or assign petitioner as his counsel. Nor does it appear that the petitioner ever requested appointment or assignment under Penal Code Section 987a (now 987.2). By some private arrangement, the terms of which are not dis-

closed to this Court, petitioner was substituted for another counsel of Mr. Manson.

By contrast, in a recent case before the California Supreme Court, the defendant requested that a particular attorney be appointed to represent him. The attorney stated that he was ready, willing, and able to accept the appointment. The trial court refused to appoint the particular attorney requested but instead assigned another attorney. The criminal defendant then refused to confer with the new attorney and petitioned for a writ of mandate to compel the appointment of his desired attorney. *Drumgo v. Superior Court* (1973) 8 Cal. 3d 930. The issue of selection of a particular counsel was thus clearly focused in that case.

Here, however, since there was no request for the appointment of petitioner as Mr. Manson's attorney and no denial of such request by the trial court, the issue of the defendant's right to select publicly-compensated counsel is not presented in a justiciable manner.

Perhaps Mr. Manson did not wish to have counsel assigned by the Court because he had reached a satisfactory private arrangement with counsel and wished to retain his broad discretion to substitute counsel. Perhaps, also, if the issue of Court appointment of counsel had arisen, Mr. Manson might have agreed to accept some other counsel selected and assigned by the Court. Then again, perhaps petitioner did not wish to

be appointed, thinking at the time that his private arrangement was preferable to the compensation provided for by the statute.

In any event, Mr. Manson did have the benefit of petitioner's services, and, therefore, no issue involving Mr. Manson's right to counsel of his choice is presented.

VI

AN INDIGENT CRIMINAL DEFENDANT HAS NO RIGHT TO A PARTICULAR COURT-APPOINTED COUNSEL.

An indigent criminal defendant has no right to the appointment of a particular attorney but only to the appointment of a competent attorney. The California Supreme Court has recently considered this issue, and concluded as follows:

> "We have repeatedly held that constitutional and statutory guarantees are not violated by the appointment of an attorney other than the one requested by defendant. (Citations) The additional factor that requested counsel has indicated his willingness and availability to act does not raise any constitutional compulsion requiring his appointment. Our established rule conforms with those of the federal courts (e.g., *Brown v. Craven* (9th Cir. 1970) 424 F. 2d 1166, 1170; *United States v. Burkeen* (6th Cir. 1966) 355 F. 2d 241, 245; *Tibett v. Hand* (10th Cir. 1961) 294 F. 2d 68, 73; *United States ex rel. Mitchell v. Thompson* (S.D.N.Y. 1944) 56 F. Supp. 683, 688-689) and,

at least absent a statute expressly providing to the contrary, of our sister state courts (e.g., *Martinez v. People* (1971) 173 Colo. 515, 519 [480 P. 2d 843]; *People v. Gray* (1965) 33 Ill. 2d 349, 353-355 [211 N.E. 2d 369]; *State v. Fagerstrom* (1970) 286 Minn. 295, 299 [176 N.W. 2d 261]; *Rahhal v. State* (1971) 52 Wis. 2d 144, 147-148 [187 N.W. 2d 800]). (See generally ABA Project on Min. Standards for Crim. Justice, Providing Defense Services (Tent. Draft 1967) § 2.3, com. (b), pp. 29-30.)"

Drumgo v. Superior Court (1973) 8 Cal. 3d 930, at 934.

The California Supreme Court compared the question of selecting a particular private defense counsel with that of selecting a particular public defender.

". . . If, as is the case, an indigent defendant who is necessarily represented by the public defender may not select the particular deputy who will represent him (*People v. Stroble* (1951) 36 Cal. 2d 615, 629 [226 P. 2d 330]), then an indigent defendant for whom assigned counsel must be appointed should likewise not be entitled to be represented by a particular attorney.

"The appointment of counsel to represent an indigent rests, as always, in the sound discretion of the trial court, and there can be no abuse of that discretion when the court appoints competent counsel who is uncommitted to any position or interest which would conflict with providing an effective defense. . . ."

Drumgo v. Superior Court (1973) 8 Cal. 3d, 930, 934-935.

Respondents believe that the sound reasoning of the California Supreme Court on this matter requires no further amplification.

VII

NO RIGHT OF PETITIONER TO COMPENSATION.

Prior to the adoption of the statutory compensation scheme in California, a Court-appointed attorney served without compensation as an incident of his role as an officer of the Court. See *Rowe v. Yuba County* (1860) 17 Cal. 61; *Lamont v. Solano County* (1874) 49 Cal. 158; Note, 21 A.L.R. 3d 827-829.

In this case, petitioner was not appointed, has ignored the statutory scheme for compensation, and yet seeks compensation under that scheme. The principle of comity should foreclose petitioner from this abuse of the statutory scheme and from his purported unilateral choice of himself as a Court-assigned, publicly-compensated attorney.

> "What the concept [Our Federalism] does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments. . . ."
>
> *Younger v. Harris* (1971) 410 U.S. 37, 44, 27 L. Ed. 2d 669, 676.

Stripped of its rhetoric, petitioner's claim amounts to the assertion that any attorney who represents an indigent criminal defendant may, at any time, without Court appointment, without contract or agreement with the public entity, without demand for payment prior to undertaking the service, and without regard to any private agreement such counsel may have with his client, demand public compensation for his services. This assertion finds no support in criminal or contract law or equity.

Under California contract law, there is no basis for an implied contract between petitioner and the County. The courts have denied recovery to attorneys who have performed services benefiting a public entity under circumstances more favorable to the plaintiff than in the present case. *Williamson v. Los Angeles County Flood Control District* (1st Dist. 1941) 42 Cal. App. 2d 622, 109 P. 2d 992.

Petitioner is, in truth, a volunteer with second thoughts. He entered the case neither seeking nor expecting public compensation for his services. Now he seeks to change his mind. This Court should not indulge petitioner's whims on this matter.

VIII

RECORD PRESENTS NO FEDERAL QUESTION OF SUBSTANCE.

Petitioner seeks a writ of certiorari directed to the California Supreme Court which denied without opinion petitioner's request for hearing on the California Court of Appeal's denial without opinion of his Petition for Writ of Mandamus etc.

Under California law, the denial of such a petition without a hearing is not generally construed as an adjudication on the merits. *People v. Medina* (1972) 6 Cal. 3d 484, 490-491, 492 P. 2d 686. And while the denial of a hearing by the Supreme Court is not without significance, neither does such denial mean that the opinion, if any, of the Court of Appeal is approved. *Di Genova v. State Board of Education* (1962) 57 Cal. 2d 167, 178, 367 P. 2d 865.

In this case, there was no written opinion by either the Court of Appeal or the Supreme Court of California. Consequently, it does not appear whether the decision of the state courts was on procedural grounds, state law grounds, or on the basis of the federal question petitioner presents to this Court. Since no federal question of substance is clearly presented by the record of this case, it would be inappropriate for this Court to grant certiorari.

IX

CONCLUSION

Petitioner has no basis in either law or justice to claim compensation for the services rendered Mr. Manson. The California courts had independent grounds for denying relief to petitioner. Those grounds were: (1) the petitioner failed to compel his appointment under Penal Code Section 987a as counsel for Mr. Manson prior to undertaking representation; (2) the petitioner failed to demand and to receive assurance of payment prior to rendering services as required under Article XI, Section 10, of the California Constitution; and (3) the Petition for Writ of Mandate etc. sought to compel only determination of compensation without seeking to compel assignment, which is a necessary precondition to compensation under the statute.

For the reasons stated herein, respondents respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

JOHN H. LARSON,
County Counsel

JOHN P. FARRELL,
Deputy County Counsel
Attorneys for Respondents.

APPENDIX

Penal Code Section 987a (superseded by Section 987.2, effective in 1971).

"In any case in which a person, including a person who is a minor, desires but is unable to employ counsel and in which counsel is assigned in the superior court, municipal court, or justice court to represent such a person in a criminal trial, proceeding or appeal, such counsel, in a county or city and county in which there is no public defender, or in a case in which the court finds that because of conflict of interest or other reasons the public defender has properly refused to represent the person accused, shall receive a reasonable sum for compensatiion and for necessary expenses, the amount of which shall be determined by the court, to be paid out of the general fund of the county.

"The Board of supervisors may by contract provide that any public defender duly appointed or elected may charge reasonable fees to the Department of Corrections for representing inmates of prisons under its control, and the Department of Corrections may upon approval by the court pay such fees into the county treasury to be placed in the general fund of the county.

"Counsel shall be appointed to represent, in the municipal or justice court, a person who desires but is unable to employ counsel, when it appears that such appointment is necessary to provide an adequate and effective defense for defendant."

Penal Code Section 987.2 (effective 1971, italicized portions were added effective in 1972).

"(a) In any case which a person, including a person who is a minor, desires but is unable to employ counsel and in which counsel is assigned in the superior court, municipal court, or justice court to represent such a person in a criminal trial, proceeding or appeal, such counsel, in a county or city and county in which there is no public defender, or in a case in which the court finds that because of conflict of interest or other reasons the public defender has properly refused to represent the person accused, shall receive a reasonable sum for compensation and for necessary expenses, the amount of which shall be determined by the court, to be paid out of the general fund of the county.

"(b) The sum provided for in subdivision (a) may be determined by contract between the court and one or more responsible attorneys after consultation with the board of supervisors as to the total amount of compensation and expenses to be paid, which shall be within the amount of funds allocated by the board of supervisors for the cost of assigned counsel in such cases.

"(c) The board of supervisors may by contract provide that any public defender duly appointed or elected may charge reasonable fees to the Department of Corrections for representing inmates of prisons under its control, and the Department of Corrections may upon approval by the court pay such fees into the county treasury to be placed in the general fund of the county.

"(d) Counsel shall be appointed to represent, in the municipal or justice court, a person who desires but is unable to employ counsel, when it appears that such appointment is necessary to provide an adequate and effective defense for the defendant."